

**JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANISATIONS AND RIGHTS OF THEIR
STAFF**

Committee on Legal Affairs and Human Rights, Council of Europe

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Introduction

Thank you for inviting me.

I've been representing the Staff Union of the European Patent Office (EPO) for many years.

Over the last four years, the situation has been rapidly deteriorating. It has now come at its lowest point.

Without any doubt, EPO's immunity is a significant cause. In theory its immunity is limited, but in practice it's absolute.

I'll use my few minutes before you to explain what has happened at EPO and how immunity has been abused by the organisation.

Let me say from the outset that the situation at EPO is an extreme case. I will talk about EPO. But I do not intend to say that the EPO story goes for all international organisations. What the EPO story does show, however, is how immunity can be abused under bad management and when conflicts arise.

Lessons can therefore be learned from the EPO case.

Brief outline of court cases against EPO

At EPO, staff are organised in a staff union, SUEPO. SUEPO is the overarching union with local unions in countries where EPO has an office, such as the Netherlands and Germany.

SUEPO is an external staff union. It is not incorporated in the EPO rules. This is quite exceptional. Not many international organisations have an external union. Most have only internal staff committees.

Almost 50 % of EPO's staff is a SUEPO member. That's 3400 people.

Yet EPO does not recognise SUEPO. It refuses to engage with it in any respect.

In 2014, SUEPO took EPO to a Dutch court, challenging EPO's refusal to accept the union.

On appeal the Court agrees, and rules that EPO violates fundamental rights, such as freedom of association under article 11 ECHR. Specifically it rules that EPO should allow SUEPO to collectively bargain on behalf of its members.

EPO claims that it enjoys immunity from the jurisdiction of the Dutch domestic court. The appeal court rejects this claim however. In the first place because SUEPO has no alternative remedy. The Court points out that EPO could have avoided the domestic procedure by creating a remedy for SUEPO inside EPO. But it had chosen not to do so. The only remedy left for SUEPO is therefore the national court.

In the second place, the Court finds that immunity would lead to a violation of fundamental rights as enshrined in the ECHR, such as freedom of association.

The decision of the appeal court is now on appeal before the Supreme Court. Its judgment is scheduled for 20 January 2017.

EPO has ignored the appeal court ruling, explicitly saying that it would not implement it.

Instead, since this ruling, EPO has started a campaign against SUEPO officials. One after the other is submitted to internal investigations and disciplinary procedures. By now, almost two years later, around 1/3 of the union officials have been targeted. They have either been dismissed, suspended, or their salary or pension have been cut.

Evaluation

In my career as a lawyer, I have never experienced a lawless situation as now prevailing at EPO.

The appeal court has weighed the argument of immunity and rejected it. This means that EPO must obey the court decision. The fact that EPO refuses to do so, is extremely troublesome.

The night before the hearing of the Supreme Court, EPO went public by saying that it would even ignore a ruling of the Supreme Court if it would not be in EPO's favour. That was a shock to everyone. EPO places itself outside the rule of law under the guise of immunity.

EPO may be the exception, and indeed I believe it is a very exceptional situation we're facing. But it does show what immunity can lead to when handled by the wrong persons. EPO president Battestelli has caused immeasurable damage to the office. Careers are being destroyed. People are being ruined. And there are no remedies.

A senior representative of a another international organisation said to me: EPO damages a system of immunity that was generally functioning well. Apparently, the immunity as it is currently organised allows for such abuse.

I believe that the question we're facing right now is not so much whether immunity should be redefined but rather how immunity as it was meant to be, can be adequately enforced. How can we stop the development in which rights of staff are eroding to the benefit of an expanding concept of immunity? How can abuse of immunity as we see at EPO be restrained?

There may be various options. I would like to briefly touch upon three: the role of domestic courts, the role of the media and the role of the member states.

Domestic courts are clearly struggling. The rejection by our Appeals Court of EPO's immunity claim was ground-breaking. Rejection of immunity has happened before but only in less significant cases - brought on behalf of contractors or single staff rather than a powerful entity like SUEPO representing half of the staff.

There is a general reluctance of courts Europe wide to truly test immunity.

The fact that the European Court of Human Rights is itself part of, or embedded in, an international organisation doesn't help to develop the jurisprudence.

What I also see is EPO playing off domestic courts against each other. EPO argues that it is impossible for it to comply with the Dutch court ruling as it allegedly diverges from rulings of German courts. In reality, the cases presented in both jurisdictions are different. The fact, however, that EPO is established in various countries is used to keep off court interference.

In addition to this EPO benefits from an almost complete lack of public scrutiny. EPO obliges union officials to keep investigations and disciplinary procedures against them confidential. They are not even allowed to make known that they are subjected to an investigation. This makes these people extremely vulnerable and the organisation powerful.

National news agencies have little access to international organisations as well. The walls of the EPO are thick. I think we should seriously reconsider the transparency of international organisations.

If it is not the courts and the media that can hold EPO to account, what's left are the member states.

EPO member states make up the Administrative Council. It is the office's only supervisory body.

Yet, by and large, the Administrative Council watch it happen. They have asked EPO to postpone the various employee investigations and disciplinary proceedings pending an independent evaluation of their compliance with law and fairness. But EPO's president Battistelli refuses. And that is the end of the story. The Member States now wait until Battistelli leaves office, I was told there are 18 months left.

As all this is happening on Dutch territory, the Dutch are trying to use their leverage in the Administrative Council. But they have only one vote. This is so while 2.500 staff are employed on Dutch territory. Other states - like Portugal and Spain where EPO has no office - have also one vote. But their interest in matters inside EPO is much smaller. These states therefore tend to support whatever the President proposes.

I believe that Member states should take their role of supervision of international organisations much more seriously.

Conclusion

I conclude.

EPO is an exceptional case.

But EPO has nearly 7000 employees. Their rights matter. Their rights are seriously disregarded.

What's more, the space and power that EPO has afforded itself, can easily be copied by others.

Perhaps we needed such a worrisome case in order to come to realise that things can indeed get out of hand. Partly under the veil of immunity.

I hope that this case triggers a re-confirmation of the boundaries of immunity and a strengthening of the enforcement of staff rights.